

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

CARMON E. WARREN,

Petitioner,

v.

D. L. RUNNELS, Warden,

Respondent.

No. C 02-5779 SBA (PR)

**ORDER DENYING MOTION FOR
RELIEF FROM JUDGMENT**

(Docket no. 41)

INTRODUCTION

Petitioner Carmon E. Warren, a state prisoner, filed this pro se motion for relief from judgment pursuant to Rule 60(b) of the Federal Rules of Civil Procedure. On March 7, 2005, this Court dismissed his petition as untimely and entered judgment in favor of Respondent. In 2007, the Ninth Circuit Court of Appeals affirmed that decision.

Petitioner now seeks relief from this Court's March 7, 2005 judgment on the ground that he was denied effective assistance of counsel during post-conviction proceedings before the Ninth Circuit. In an Order dated January 14, 2011, this Court granted Respondent leave to file a response to Petitioner's motion. On February 7, 2011, Respondent filed an opposition to Petitioner's motion for relief from judgment. Petitioner's reply to the opposition was due on April 7, 2011; however, he did not file a reply.

For the reasons outlined below, the Court DENIES Petitioner's motion for relief from judgment.

BACKGROUND

On March 22, 1999, an Alameda County jury found Petitioner guilty of second-degree robbery with a firearm enhancement. On May 21, 1999, the Alameda County Superior Court sentenced Petitioner to nineteen years in prison.

On direct appeal, the California Court of Appeal affirmed the trial court's judgment in an

1 unpublished opinion filed on September 19, 2000. Petitioner did not file a petition for review in the
2 California Supreme Court. The appellate court opinion therefore became final on October 29, 2000.
3 See Smith v. Duncan, 297 F.3d 809, 812-13 (9th Cir. 2002) (limitation period began running day
4 after time to seek discretionary review of California Court of Appeal's decision in the Supreme
5 Court of California expired, which was forty days after the appellate court filed its opinion) (citing
6 Cal. Rules of Court 24(a), 28(b), 45(a); Cal. Civ. Proc. Code § 12a).

7 On September 20, 2001, Petitioner filed a petition for a writ of habeas corpus in the
8 Alameda County Superior Court. That superior court denied his petition on September 27, 2001.
9 Petitioner then filed a petition for a writ of habeas corpus in the California Court of Appeal on
10 October 24, 2001. The appellate court denied his petition on October 26, 2001. Petitioner filed a
11 petition for a writ of habeas corpus in the California Supreme Court on January 29, 2002. The state
12 supreme court denied his petition on July 31, 2002. Petitioner filed another petition for a writ of
13 habeas corpus in the California Supreme Court on January 15, 2004, and that petition was denied on
14 September 15, 2004.

15 On December 12, 2002, Petitioner filed his federal habeas petition in this Court. As
16 mentioned above, on March 7, 2005, the Court granted Respondent's motion to dismiss the petition
17 as untimely, and entered judgment in favor of Respondent. On April 6, 2006, Petitioner filed his
18 notice of appeal as well as a motion for a certificate of appealability. On January 6, 2006, Petitioner
19 filed an amended motion for a certificate of appealability. On June 26, 2006, the Court granted
20 Petitioner's motion for a certificate of appealability.

21 On August 14, 2006, Petitioner filed an Informal Opening Brief with the Ninth Circuit.
22 (Resp't Opp'n to Mot. for Relief from J., Ex. A, Ninth Cir. Doc. no. 7.) Respondent's opposing brief
23 was filed on September 13, 2006. (Id., Ninth Cir. Doc. no. 10.) On October 23, 2006, Petitioner
24 filed his reply brief. (Id., Ninth Cir. Doc. no. 15.)

25 On October 20, 2006, the Ninth Circuit granted Petitioner's motion for appointment of
26 appellate counsel. (Id., Ninth Cir. Doc. no. 35.) On November 5, 2006, the Ninth Circuit appointed
27 Attorney Barry L. Morris as Petitioner's appellate counsel. (Id., Ninth Cir. Doc. no. 36.)

28 On March 23, 2007, the Ninth Circuit granted Petitioner's counsel leave to late-file a

1 substitute appellant's brief. (Id., Ninth Cir. Doc. no. 23.) Four days later, on March 27, 2007,
2 Petitioner filed a pro se motion for appointment of substitute counsel. (Id., Ninth Cir. Doc. no. 24.)
3 On May 1, 2007, the Appellate Commissioner filed an Order declining to entertain Petitioner's pro
4 se motion on the grounds that Petitioner had been appointed an appellate counsel and that only his
5 counsel should file motions. (Id., Ninth Cir. Doc Nos. 25, 31.) The May 1, 2007 Order also directed
6 Attorney Morris to confer with Petitioner and file a response to his pro se motion within fourteen
7 days. (Id., Ninth Cir. Doc. no. 31.) On May 4, 2007, Respondent filed a brief in response to
8 Petitioner's substitute appellant's brief. (Id., Ninth Cir. Doc. no. 32.) On May 16, 2007, the Court
9 granted Attorney Morris's motion for a fourteen-day oral extension to file a reply brief. (Id., Ninth
10 Cir. Doc. no. 33.)

11 On June 5, 2007, the Appellate Commissioner filed an Order noting that Attorney Morris had
12 not complied with the commissioner's May 1, 2007 Order. (Id., Ninth Cir. Doc. no. 34.) The Court
13 gave Attorney Morris an additional fourteen days within which to comply with that order and
14 warned counsel that "[f]ailure to respond timely to this order may result in the imposition of
15 sanctions on counsel," including ineligibility to receive Criminal Justice Act appellate appointments
16 and compensation for his representation. (Id.) On June 19, 2007, Petitioner's appointed counsel
17 filed his response with the Appellate Commissioner. (Id., Ninth Cir. Doc. no. 36.)

18 On July 3, 2007, the Appellate Commissioner filed another Order stating that on the basis of
19 the June 19, 2007 response by Attorney Morris, the court would take no further action on its May 1,
20 2007 and June 5, 2007 Orders. (Id., Ninth Cir. Doc. no. 38.) Attorney Morris was also granted an
21 additional fourteen days to file an optional reply brief. (Id.) No reply brief was ever filed.

22 On August 7, 2007, Petitioner's appeal was calendared for oral argument on October 18,
23 2007. (Id., Ninth Cir. Doc. no. 41.) Three weeks later, the Ninth Circuit ordered that the case be
24 submitted on the briefs. (Id., Ninth Cir. Doc. no. 43.) A memorandum disposition was filed on
25 October 22, 2007. (Id., Ninth Cir. Doc. no. 47.) The Ninth Circuit affirmed this Court's March 7,
26 2005 dismissal of the petition as untimely. The mandate was issued on November 16, 2007. (Id.,
27 docket no. 49.) On December 10, 2007, the Ninth Circuit received Petitioner's pro se petition for
28 panel rehearing/rehearing en banc but concluded that his petition was "[d]eficient" and "late"

1 because the mandate had already been issued. (Id., Ninth Cir. Doc. no. 51.)

2 On December 15, 2008, Petitioner filed another motion in the Ninth Circuit requesting
3 appointment of new counsel. (Id., Ninth Cir. Doc. no. 53.) The Ninth Circuit took no action on that
4 motion. On July 13, 2009, Petitioner filed a motion requesting reconsideration and permission to
5 late-file a petition for panel rehearing/rehearing en banc. (Id., Ninth Cir. Doc. no. 56.) The Ninth
6 Circuit filed an Order on July 27, 2009, stating, "Petitioner's motion for reconsideration, received by
7 the Court on July 13, 2009, is denied as untimely. The mandate in this appeal issued on November
8 16, 2007. No further motions will be entertained." (Id., Ninth Cir. Doc. no. 57.)

9 Thereafter, Petitioner filed the present motion for relief from judgment.

10 LEGAL STANDARD

11 Rule 60(b) lists six grounds for relief from a judgment. Such a motion must be made within
12 a "reasonable time," and as to grounds for relief (1) - (3), no later than one year after the judgment
13 was entered. See Fed. R. Civ. P. 60(b). A Rule 60(b) motion does not affect the finality of a
14 judgment or suspend its operation. See id. Therefore, a party is not relieved of its obligation to
15 comply with the court's orders simply by filing a Rule 60(b) motion. See Hook v. Arizona Dep't of
16 Corrections, 107 F.3d 1397, 1404 (9th Cir. 1997).

17 Rule 60(b) provides for reconsideration only upon a showing of: (1) mistake, inadvertence,
18 surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have
19 been discovered before the court's decision; (3) fraud by the adverse party; (4) the judgment is void;
20 (5) the judgment has been satisfied; (6) any other reason justifying relief. Fed. R. Civ. P. 60(b);
21 School Dist. 1J v. ACandS Inc., 5 F.3d 1255, 1263 (9th Cir.1993). Rule 60(b) provides a
22 mechanism for parties to seek relief from a judgment when "it is no longer equitable that the
23 judgment should have prospective application," or when there is any other reason justifying relief
24 from judgment. Jeff D. v. Kempthorne, 365 F.3d 844, 853-54 (9th Cir. 2004) (quoting Fed. R. Civ.
25 P. 60(b)). Rule 60(b) is not intended to remedy the effects of a deliberate and independent litigation
26 decision that a party later comes to regret through second thoughts or subsequently gained
27 knowledge. Latshaw v. Trainer Wortham & Co., 452 F.3d 1097, 1099 (9th Cir. 2006) (denying
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1 reconsideration to a party who had settled and then discovered that her attorney had made legal
2 errors in advising her to settle).

3 Rule 60(b)(6) is a "catchall provision" that applies only when the reason for granting relief is
4 not covered by any of the other reasons set forth in Rule 60. Samish Indian Tribe v. Washington,
5 394 F.3d 1152, 1157 (9th Cir. 2005). "It has been used sparingly as an equitable remedy to prevent
6 manifest injustice and is to be utilized only where extraordinary circumstances prevented a party
7 from taking timely action to prevent or correct an erroneous judgment." Id. (internal quotations
8 omitted). Thus, to reopen a case under Rule 60(b)(6), a party must establish "both injury and
9 circumstances beyond his control that prevented him from proceeding in a proper fashion." Id.
10 (internal quotations omitted). Mere dissatisfaction with the court's order or belief that the court is
11 wrong in its decision are not adequate grounds for relief. Twentieth Century - Fox Film Corp., 637
12 F.2d at 1341. Gross negligence by an attorney does not warrant reconsideration pursuant to Rule
13 60(b)(6), unless the gross negligence leads to default judgment. See Latshaw, 452 F.3d at 1102-03
14 (citing Community Dental Services v. Tani, 282 F.3d 1164, 1168 (9th Cir. 2002)); see also Lal v.
15 California, 610 F.3d 518, 524-25 (9th Cir. 2010) (gross negligence that results in a dismissal for
16 failure to prosecute under Rule 41(b) is comparable to a default judgment and may constitute a basis
17 for relief under Rule 60(b)(6)).

18 A notice of appeal does not divest the district court of jurisdiction if at the time it was filed
19 there was then a pending motion for reconsideration. United Nat'l Ins. Co. v. R&D Latex Corp., 242
20 F.3d 1102, 1109 (9th Cir. 2001). Under Federal Rule of Appellate Procedure 4(a)(4)(B)(i), such a
21 notice of appeal does not become effective, and the district court does not lose jurisdiction, until the
22 district court rules on all motions for reconsideration filed no later than ten days after judgment is
23 entered. Miller v. Marriott Int'l., Inc., 300 F.3d 1061, 1063-64 (9th Cir. 2002).

24 To seek Rule 60(b) relief during the pendency of an appeal, the proper procedure is to ask the
25 district court whether it wishes to entertain the motion, or to grant it, and then move the court of
26 appeals, if appropriate, for remand of the case. Williams v. Woodford, 384 F.3d 567, 586 (9th Cir.
27 2004). A district court lacks jurisdiction to rule on a Rule 60(b) motion filed after a notice of appeal
28 unless this procedure "to revest the district court with jurisdiction to consider [the] Rule 60(b)

1 motion" is followed. Id.

2 DISCUSSION

3 Petitioner requests "an order to allow relief from a final judgment and request re-opening of
4 [this] case." (Pet'r Mot. for Relief from J. at 1.) He alleges that Attorney Morris, the attorney
5 appointed to represent his case on appeal before the Ninth Circuit, failed to address his
6 "[§] 2244(d)(1)(D) certified issue." (Id. at 3.) However, Petitioner's motion for relief from
7 judgment fails, because (1) this Court lacks jurisdiction; (2) his claim is precluded by the clear
8 language of 28 U.S.C. § 2254(i); and (3) his motion is untimely under Rule 60(b)(6).

9 First, this Court lacks jurisdiction. Petitioner bases his motion for relief from judgment on
10 the conduct and competency of an attorney appointed to represent him before the Ninth Circuit.
11 None of the proceedings or filings or other events of which Petitioner complains took place before
12 this Court. Further, Petitioner has not previously filed a motion for relief from this Court's March 7,
13 2005 judgment. Rather, after the judgment was issued, he filed an appeal with the Ninth Circuit, and
14 he requested and received a certificate of appealability. At that point, this Court no longer had any
15 jurisdiction to consider post-judgment pleadings. Petitioner's remedy in response to the Ninth
16 Circuit's affirmance of this Court's decision was to petition the Ninth Circuit for panel rehearing or
17 for rehearing en banc pursuant to the Federal Rules of Appellate Procedure 35(a) and 40(a). And, as
18 mentioned above, Petitioner filed these petitions. However, the Ninth Circuit denied them as
19 untimely. Accordingly, this Court cannot provide relief from its May 7, 2005 judgment under Rule
20 60(b) because it lacks the jurisdiction to do so.¹

21
22 Second, even if this Court had jurisdiction, the clear language of 28 U.S.C. § 2254(i)
23 precludes Petitioner's claim for relief from judgment on the basis of ineffective assistance of counsel
24 during a post-conviction proceeding before the Ninth Circuit. Petitioner alleges that Attorney

25
26 ¹ The Court need not reach Respondent's argument with respect to the law of the case
27 doctrine. The Ninth Circuit did not remand Petitioner's case to this Court, and Petitioner does not
28 seek to reopen any issues already adjudicated by this Court and affirmed by the Ninth Circuit.
Rather, Petitioner seeks to challenge an issue -- denial of effective assistance of counsel -- that
originated from his appeal and was decided by the Ninth Circuit during post-conviction proceedings.
The law of the case doctrine therefore does not apply.

1 Morris failed to address a claim that he believed would warrant reversal of this Court's March 7,
2 2005 Order dismissing his petition as untimely. Petitioner argues that this failure on the part of
3 Attorney Morris constituted "extraordinary circumstances" giving rise to relief under Rule 60(b)(6).
4 However, § 2254(i) reads, "The ineffectiveness or incompetence of counsel during Federal or State
5 collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under
6 section 2254." 28 U.S.C. § 2254(i). Petitioner's case arises under § 2254. Accordingly, having
7 asked "for relief" under Rule 60(b)(6) on the "ground" of ineffective assistance of counsel, Petitioner
8 has failed to offer a valid ground under the clear terms of § 2254.

9 Finally, even if Petitioner had a valid ground on which to base his motion, his request is
10 untimely. Rule 60(c)(1) reads in part, "A motion under Rule 60(b) must be made within a
11 reasonable time." The Ninth Circuit denied Petitioner's motion for reconsideration to file a late
12 petition for panel rehearing and petition for rehearing en banc on July 27, 2009. Seventeen months
13 later, on December 23, 2010, Petitioner filed the present motion. Petitioner fails to explain why he
14 waited well over a year to bring his motion. In the absence of any compelling reason to disregard
15 such a long delay, the Court finds that Petitioner's motion is untimely.

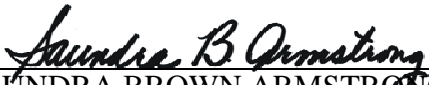
16 CONCLUSION

17 For the foregoing reasons, pursuant to Rule 60(b) of the Federal Rules of Civil Procedure,
18 the Court DENIES Petitioner's motion for relief from its March 7, 2005 judgment.

19 This Order terminates Docket no. 41.

20 IT IS SO ORDERED.

21 DATED: 8/17/11

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23 SAUNDRA BROWN ARMSTRONG
24 United States District Judge

United States District Court
For the Northern District of California

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